

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: SJ-2017-0347 & SJ-2018-M012

COMMITTEE FOR PUBLIC COUNSEL SERVICES & others

vs.

ATTORNEY GENERAL & others

MOTION TO RECONSIDER NOTICE LETTER LANGUAGE

The Petitioners move for reconsideration of an apparent decision to omit, from the notice letter that will be mailed to thousands of Farak defendants, an agreed-upon sentence informing defendants that exculpatory evidence was improperly withheld from them.

Background

On March 7, 2018, this Court appointed retired Appeals Court Justice Judd Carhart as Special Master. As part of a "Working Group," the parties and the Special Master have collaborated to draft a letter to Farak defendants whose relevant drug charges have been dismissed. After many months of discussions, the Petitioners, the Attorney General's Office, and the Special Master agreed on language informing defendants of the undisputed misconduct of two former attorneys in the Attorney General's Office. On October 25, 2018, after the Working Group had shared a draft notice letter with the Single Justice (Exhibit 1 hereto), the clerk emailed the Working Group a revised notice letter (Exhibit 2 hereto). The revised letter omitted the language about the former AGO attorneys, which had read as follows:

One reason that you might not have heard about Ms. Farak's role in your case is that, according to findings by a Massachusetts judge, two former assistant attorneys general improperly failed to turn over evidence that could have helped you in court.

On October 26, 2018, Special Master Carhart sent an email to the clerk and the Working Group expressing support for the notice letter as agreed-upon by the Petitioners and the AGO:

I am in receipt of the proposed letter. I know that the parties have all worked hard to come up with a draft. I am in favor of the draft circulated at yesterday's meeting. The decision, of course, is up to Justice Gaziano.

The Petitioners, too, recognize that the decision about the notice letter belongs to the Single Justice. But we believe this issue is important. We therefore object to the language in the notice letter that was circulated, to the extent that it excludes the sentence about the withholding of evidence, and ask that the decision to exclude that sentence be reconsidered.

Discussion

The Petitioners share the Special Master's preference for the notice letter agreed upon by the parties, including its sentence about the withholding of exculpatory evidence. As we have emphasized throughout this process, we believe it is essential to inform this scandal's victims that evidence was improperly withheld from them. After all of these years, people deserve to learn what happened. But if the notice letter does not tell them about the prosecutorial misconduct, they might never know. It is crucially important that the victims of the AGO's misconduct are notified of that misconduct.

First, as a matter of fundamental fairness, one goal of the notice letter must be to tell thousands of defendants — many for the first time — about the government misconduct that was committed against them. In the drug lab litigation, the full Court has repeatedly recognized “a prosecutor's duty to learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team.” *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015) (cleaned up); *see also Commonwealth v. Ware*, 471 Mass. at 85, 95-96; *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 471 Mass. 465, 481 (2015). Consistent with that obligation, the *Bridgeman* notice

letter expressly told defendants not only about the judicial remedy they had received as a result of misconduct, but also about the misconduct itself.¹ Chief Justice Gants’s video message to defendants contained the same information.²

Second, the need to inform defendants of government misconduct does not disappear when that misconduct was committed by a government lawyer as opposed to a government chemist. Thousands of defendants were kept in the dark for far too long about the government misconduct in their cases. They must now be told what happened. *See Committee for Public Counsel Servs. v. Attorney Gen.*, 480 Mass. 700, 702 (2018) (“*CPCS v. AG*”) (“[M]embers of the Attorney General’s office . . . were duty-bound to investigate and disclose Farak’s wrongdoing.”).

Finally, the agreed-upon language is similar to, but milder than, language used by the Full Court in *CPCS v. AG*, which held that the “government misconduct at issue also involved the deceptive withholding of exculpatory evidence by members of the Attorney General’s office” and that this misconduct was “so intentional and so egregious” that it warranted harsher sanctions than were imposed in *Bridgeman II*. *See CPCS v. AG*, 480 Mass. at 702, 725.

Conclusion

Those wronged by government misconduct, people who were imprisoned or suffered collateral consequences for longer than they otherwise would have because the Attorney General’s Office hid exculpatory evidence, need to be told about the AGO’s actions. This case is a direct result of the government hiding things that defendants had a right to know – and it needs to stop. The parties have worked in good faith to develop proposed language responsive to this concern. Petitioners respectfully ask that the Single Justice revise the notice letter to include this language.

¹ *See Drug lab cases information* (May 18, 2017), at <https://www.mass.gov/news/drug-lab-cases-information>.

² *Id.*

Respectfully submitted,

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By its attorneys,



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EXHIBIT 1

**Notice Letter Proposed by the Petitioners,
Attorney General's Office,
and Special Master on October 24, 2018**

DRAFT based on Petitioners proposal of 9/6/18 10:58 p.m.

HEADING

Dear

I am a judge on the Supreme Judicial Court, the highest court in Massachusetts. I am writing to tell you that the court has dismissed certain conviction(s) or other disposition(s) against you, and that the court has also dismissed the underlying charge(s). The dismissed convictions are shown on the attached page(s), listed by court, docket number, count, and charge.

Why is the court dismissing these convictions?

A chemist named Sonja Farak engaged in serious misconduct involving her work at a state drug lab. Your case includes one or more drug convictions affected by Ms. Farak. The court has now dismissed the conviction(s). This dismissal is final and permanent, which means you cannot be prosecuted again for any charge that has been dismissed. One reason that you might not have heard about Ms. Farak's role in your case is that, according to findings by a Massachusetts judge, two former assistant attorneys general improperly failed to turn over evidence that could have helped you in court.

What happens next?

Your criminal record has been updated to remove the conviction(s). The removal of a conviction may provide important benefits to you related to employment, housing, immigration, and more.

However, your record has not been sealed. You can find more information about sealing your record at www.masslegalhelp.org/cori.

In addition, you might have other charges in the same case that were not dismissed and that remain on your record. You may want to speak to a lawyer about whether these convictions can also be undone.

You might also have paid money because of these convictions, such as fines, court fees, probation fees, or restitution. You may want to speak to a lawyer about whether you are entitled to have any money returned to you.

If you have any questions about this letter, including how to get a lawyer to help you, you may contact the Committee for Public Counsel Services (the state public defender agency) by calling its confidential Drug Lab Case Hotline at **888-999-2881**, or by visiting its web site: www.publiccounsel.net/dlclu. You may also find information on the court's website: www.mass.gov/courts/druglab.

Sincerely,

Associate Justice, Supreme Judicial Court

EXHIBIT 2

**Notice Letter Received
from Court Clerk
on October 25, 2018**

DRAFT based on Petitioners proposal of 9/6/18 10:58 p.m.

HEADING

Dear

I am a judge on the Supreme Judicial Court, the highest court in Massachusetts. I am writing to tell you that the court has dismissed certain conviction(s) or other disposition(s) against you, and that the court has also dismissed the underlying charge(s). The dismissed convictions are shown on the attached page(s), listed by court, docket number, count, and charge.

Why is the court dismissing these convictions?

A chemist named Sonja Farak engaged in serious misconduct involving her work at a state drug lab. Your case includes one or more drug convictions affected by Ms. Farak. The court has now dismissed the conviction(s). This dismissal is final and permanent, which means you cannot be prosecuted again for any charge that has been dismissed.

What happens next?

Your criminal record has been updated to remove the conviction(s). The removal of a conviction may provide important benefits to you related to employment, housing, immigration, and more.

However, your record has not been sealed. You can find more information about sealing your record at www.masslegalhelp.org/cori.

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If you have any questions about this letter, including how to get a lawyer to help you, you may contact the Committee for Public Counsel Services (the state public defender agency) by calling its confidential Drug Lab Case Hotline at **888-999-2881**, or by visiting its website:

www.publiccounsel.net/dlclu. You may also find information on the court's website: www.mass.gov/courts/druglab.

Sincerely,

Frank M. Gaziano
Associate Justice

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CERTIFICATE OF SERVICE

I certify that on October 30, 2018, I served a copy of the foregoing document by mailing via the United States Post Office, First Class mail postage paid, and via email, to the parties on the attached list.



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